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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1454

JOSEPH ANTHONY DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of relief under 28 U.S.C. 2255 (Pet. App. 18a–19a) is reported at 472 F.2d 596. The order of the district court denying relief (Pet. App. 15a–17a) is unreported.

The order of this Court denying certiorari from the decision of the court of appeals affirming petitioner's conviction is reported at 405 U.S. 933. The order of the court of appeals denying a petition for rehearing with a suggestion for rehearing *en banc* (Pet. App. 12a) is not reported. The opinion of the court of appeals affirming the conviction (Pet. App. 11a) is re-

ported at 447 F.2d 1376. The oral findings of the district court (Pet. App. 2a–6a) and the written findings of fact and conclusions of law after remand (Pet. App. 7a–10a) are not reported. The opinion of the court of appeals remanding the original appeal for further hearings is reported at 432 F.2d 1009.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1972. Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari until April 25, 1973, and the petition was filed on that date. This Court granted certiorari on November 5, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a defendant charged with failing to report for induction under 50 U.S.C. App. 462 after failing to report for his physical examination can defend on the ground that he has not been given a physical examination.

2. Whether a Section 2255 motion that alleges the invalidity of a conviction for failing to comply with an order to report for induction on the ground that the order was technically not authorized by valid regulations states a claim subject to collateral relief after a final judgment of conviction.

3. Whether, if the decision of the Ninth Circuit in *United States* v. *Fox* is correct, that decision should be applied retroactively.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

50 U.S.C. App. 455(a)(1) provides in pertinent part:

The selection of persons for training and service under section 4 shall be made in an impartial manner, under such rules and regulations as the President may prescribe, from the persons who are liable for such training and service and who at the time of selection are registered and classified, but not deferred or exempted * * *

32 C.F.R. (1967 rev.) 1602.4 provided:

A "delinquent" is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law.

32 C.F.R. (1967 rev.) 1642.4 provided in pertinent part:

> (a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.
>
> (b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101.). * * *

Former 32 C.F.R. (1967 rev.) 1631.7 provided in pertinent part:

> (a) Each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I–A and Class I–A–O and have been found acceptable for service in the Armed

Forces and to whom the local board has mailed a Statement of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: *Provided,* That a registrant classified in Class I–A or Class I–A–O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form No. 62): *And provided further,* That a registrant classified in Class I–A or I–A–O who has volunteered for induction may, if an appeal is not pending in his case and the period during which an appeal may be taken has expired, be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form No. 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first. * * *

32 C.F.R. (1971 rev.) 1631.7 provided in pertinent part:

(a) When a call is received by a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service for a specified number of men to be delivered for induction, or for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, the Executive

Secretary or clerk, if so authorized, or a local board member shall select, as provided herein, and issue orders to report for induction to the number of men required to fill the call from among its registrants who have been classified in Class I–A or Class I–A–O and have been found acceptable for service in the Armed Forces and to whom a Statement of Acceptability (DD Form 62) has been mailed at least 21 days before the date fixed for induction: *Provided,* That notwithstanding Part 1628 or any other provision of these regulations, when a registrant classified in Class I–A or Class I–A–O has refused or otherwise failed to comply with an order of his local board to report for and submit to an armed forces physical examination, he may be selected and ordered to report for induction even though he has not been found acceptable for service in the Armed Forces and a Statement of Acceptability (DD Form 62) has not been mailed to him, and in such case the armed forces physical examination shall be performed after he has reported for induction as ordered and he shall not be inducted until his acceptability has been satisfactorily determined: *Provided further,* That a registrant classified in Class I–A or Class I–A–O who has volunteered for induction may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. * * * [The substance of this revision is now to be found in 32 C.F.R. 1631.6(a).]

STATEMENT

1. THE SECTION 2255 PROCEEDINGS

On June 5, 1972, petitioner filed a motion under 28 U.S.C. 2255 alleging that the decision of the Ninth Circuit in *United States* v. *Fox*, 454 F.2d 593, required that his conviction under 50 U.S.C. App. 462 for failing to report for induction be set aside (R. 7).[1]

The district court denied petitioner's motion (Pet. App. 15a–17a), and the court of appeals affirmed, *per curiam*, stating that the issue had been decided adversely to petitioner on direct appeal and that he therefore could not collaterally attack his conviction on the same ground (472 F.2d 596; Pet. App. 18a-19a). It also noted that the *Fox* court had not purported to overrule the prior decision by another panel of the Ninth Circuit in petitioner's case, which had affirmed petitioner's conviction after consideration and rejection of the arguments found valid in *Fox*. Petitioner did not seek rehearing *en banc* from the affirmance of the denial of his Section 2255 motion.

2. THE PROCEEDINGS ON DIRECT REVIEW OF PETITIONER'S CONVICTION

a. After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of having failed to report for

[1] *Fox* had held on facts similar to those involved in this case that since, as a result of his delinquent status, Fox was ordered to report for induction without having taken a physical or receiving a statement of acceptability, his induction order was invalid under *Gutknecht* v. *United States*, 396 U.S. 295.

induction on July 11, 1967, in violation of 50 U.S.C. App. 462. He was sentenced to three years' imprisonment.[2]

The facts adduced at trial showed that on October 4, 1963, petitioner registered with Local Board No. 101, Los Angeles, California (SSF 2) and was classified I-A on February 3, 1965 (SSF 3).[3] On February 16, 1965, the local board sent petitioner an order directing him to report for a physical examination on March 4, 1965 (SSF 26). The order was mailed to a Los Angeles post office box which, less than two months before, petitioner had specified as his mailing address (SSF 5). Petitioner failed to appear for the physical examination (A. 12). He subsequently wrote his local board that illness had prevented him from reporting for the physical as ordered (SSF 28–29).

On September 19, 1965, the local board mailed to petitioner at the same address an order to report for a physical examination on October 8, 1965 (SSF 30). The letter was returned to the local board three days later stamped "addressee unknown" (SSF 31). Petitioner did not report for the physical as directed (A. 12).

On December 6, 1965, the local board wrote petitioner at the post office box address to warn him that it was considering declaring him a delinquent because of his failure to report for the October 8, 1965, physical (A. 13). This communication was returned to the

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[2] After petitioner had served four months of his term, the district court reduced the sentence to three years' probation.

[3] "SSF" refers to petitioner's Selective Service File (Gov't Ex. #1), which was received into evidence at trial (Tr. 41).

local board on December 15, 1965, also stamped "addressee unknown" (SSF 33).

The local board thereupon wrote to one Walter Suthern of Los Angeles, whom petitioner had previously indicated would always know his current address (SSF 5 and 36). On March 2, 1966, the board received a reply from Mr. Suthern giving 3781 1/4 Menlo, Los Angeles as petitioner's proper address (SSF 36). On April 6, 1966, the local board remailed the delinquency warning to the Menlo address (SSF 33). On April 14, 1966, the letter was returned stamped "unknown at address" (SSF 35).

On May 4, 1966, the local board declared petitioner a delinquent pursuant to 32 C.F.R. 1642.4 and mailed him a delinquency notice at the Menlo address (A. 14). That same day, petitioner appeared at the local board and completed a questionnaire on which he gave 3781 1/4 Menlo as his current mailing address (SSF 41). On February 21, 1967, the local board mailed to the Menlo address an order directing petitioner to report for induction on March 7, 1967 (A. 15). The order was returned stamped "addressee unknown" on February 23, 1967 (SSF 44). Petitioner did not report on the day set for induction (A. 12).

On June 20, 1967, the local board sent petitioner an order to report for induction on July 11, 1967 (A. 16). This time the board mailed the induction order to a St. Paul, Minnesota address which petitioner had used in May 1966, when requesting a duplicate draft card (SSF 37). On July 11, 1967, petitioner again failed to report for induction. His prosecution for

that failure to report then followed, and he was convicted.

On appeal, the court of appeals remanded the case to the district court "without limitation of scope but especially for consideration of the case in the light of the intervening decision of *Gutknecht* v. *United States*, 396 U.S. 295" (432 F. 2d at 1010; Pet. App. 1a).[4]

b. On remand, the district court conducted a hearing at which the executive secretary of the local board testified that petitioner would have been ordered inducted earlier had he not failed to appear for the physical (H. Tr. 42). The government, in corroboration, introduced the local board's "delivery lists" (A. 17–25), which showed the induction dates of other registrants at petitioner's local board (H. Tr. 43). The district court found that if petitioner had complied with the local board's procedures and had not been declared a delinquent, he would have been ordered to report for induction by November 15, 1966—almost eight months before the date on which he finally failed to report (July 11, 1967) (Pet. App. 8a). From these facts, the district court concluded that petitioner's induction order had not been accelerated because of his delinquency status and that *Gutknecht* was therefore inapplicable. The district court further concluded that petitioner's rights were not prejudiced when the local board ordered him to report for induction without first

[4] In *Gutknecht*, this Court held the delinquency regulations invalid when applied to accomplish a punitive acceleration of the defendant's induction.

giving him a physical and sending him a notice of acceptability, since the lack of the physical and of the notice resulted from petitioner's own failure to report for a physical examination as ordered. Moreover, the district court noted that petitioner would have received a complete physical examination prior to induction on July 11, 1967, if he had reported on that date as ordered (Pet. App. 9a–10a). Accordingly, the district court declined to set aside petitioner's conviction.

The court of appeals affirmed, *per curiam* (447 F. 2d 1376; Pet. App. 11a). A petition for rehearing with a suggestion for rehearing *en banc* was denied on September 13, 1971 (Pet. App. 12a). This Court, although advised of the intervening *Fox* decision, denied certiorari on February 22, 1972 (405 U.S. 933; Pet. App. 13a).

Nearly two months later, petitioner filed in the court of appeals a "Motion for Extension of Time in Which to File a Petition for Rehearing." The court of appeals, noting that certiorari had been denied on February 22, 1972, and that the motion "was not tendered for filing in this court until the 19th day of April, 1972," rejected the tender and ordered the clerk to return the motion to petitioner (Pet. App. 14a). Petitioner then instituted this Section 2255 proceeding.

SUMMARY OF ARGUMENT

There are three independently sufficient reasons why the decision of the court of appeals should be affirmed: (1) The conviction of petitioner was proper; (2) his claim is not of a type subject to collateral re-

lief under 28 U.S.C. 2255; and (3) even if the rule of *United States* v. *Fox*, 454 F. 2d 593, on which he principally relies, is correct, it should be applied prospectively and should not operate as a basis to vacate this conviction. Although, in the procedural context of this case, the Court should first consider whether or not petitioner's claim is of a type subject to collateral relief, it facilitates exposition to discuss first his substantive claim.

I

The conviction of petitioner for refusing to report for induction was proper because his induction order was properly issued by the local board. Although petitioner's induction order was, under the regulation then in effect, technically based on his delinquency in failing to appear as ordered for his physical examination, that does not render the order defective. *Gutknecht* v. *United States*, 396 U.S. 295, did not hold that any induction order based upon delinquency status is invalid, but only invalidated the delinquency regulations when they led to an induction order issued as a punitive sanction resulting in acceleration of a registrant's induction or deprivation of an exemption or deferment to which he may have been entitled.

As applied to petitioner, the sole effect of the delinquency declaration was to waive the requirement of another portion of the regulations that a physical examination and statement of acceptability precede the issuance of an order to report for induction. It was petitioner who, by his deliberate misconduct, made it impossible to administer a physical examination; in-

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deed, petitioner would still have received his physical examination prior to induction had he reported as ordered. Moreover, petitioner's conviction turned upon a factual finding that he was ordered to report for induction several months later than he otherwise would have been, so that his delinquency actually led to a postponement rather than an acceleration of induction. Thus, the considerations supporting the *Gutknecht* decision are entirely absent when determining the possible extension of that holding to encompass petitioner's delinquency.

Even if this Court concludes that the order to petitioner to report for induction was technically defective, it does not follow that he should be permitted to raise the defect as a defense in a criminal proceeding for disobediance of the order. Allowance of such a defense should turn on a showing that the alleged defect in the induction order prejudiced the registrant. This case contains not even the remotest suggestion of any such prejudice arising from the supposed irregularity, so that if any irregularity did exist, it should properly be viewed in this context as harmless error.

II

28 U.S.C. 2255 codifies *habeas corpus* practice, with the forum of adjudication moved from the place of incarceration to the place of sentencing. Under long-standing principles, collateral relief is available only for those claims that are of constitutional dimension. Where, as here, petitioner claims the violation of no fundamental constitutional right, and where he has had one full and fair opportunity to advance his claims, the writ is not available.

Petitioner asserts that *Gutknecht* v. *United States*, 396 U.S. 295, is a "constitutional holding," but he points to no constitutional right which he was deprived of by his conviction. His claim relates only to the Selective Service regulations in force at the time of his induction. Those regulations provided that, absent delinquency status, petitioner could not have been ordered to report for induction without a physical examination. But the right to such an examination prior to an order to report for induction is not a constitutional or even a statutory right. The fact that the Ninth Circuit, in *United States* v. *Fox, supra*, decided this issue differently and may have "changed" the law does not advance petitioner's claim, for disparities within the judicial system are not of themselves constitutional violations. While the *Fox* decision may tend to support the correctness of the arguments unsuccessfully made by petitioner in appealing his conviction, it does not transform his claim into one of a character entertainable in collateral review proceedings.

Although cases such as *Sanders* v. *United States*, 373 U.S. 1, and *Kaufman* v. *United States*, 394 U.S. 217, on which petitioner relies, suggest that change of law is relevant to the availability of collateral relief from a criminal conviction, they do not aid petitioner. Both Sanders and Kaufman were seeking a forum for vindication of constitutional claims, and their cases were solely concerned with the *procedural disabilities* that might otherwise arise from either prior litigation

of the same issue or a failure to have raised the issue in prior proceedings. We agree that if *Fox* were a change of law (a debatable proposition), *Sanders* would suggest the possibility that petitioner's claim could be entertained anew (although we submit that he could not meet the "ends of justice" test of *Sanders*), *but only provided that his claim was of an appropriate character.* Neither *Sanders* nor *Kaufman* speaks to that issue, and the applicable precedents clearly establish that it was not of such character.

III

If the decision in *United States* v. *Fox, supra,* is correct, contrary to our argument under point I, and if petitioner's claim is subject to collateral relief, contrary to our argument under point II, the rule in *Fox* should nevertheless not be given retroactive application to petitioner's case.

In *Gutknecht* and similar cases, application of the delinquency regulations operated, in subversion of the congressional policy embodied in the act, to punish registrants by accelerating induction to an earlier time than would have been lawful absent the delinquency, or to deprive them of exemptions or deferments to which they were entitled. Here, by contrast, the delinquency-based induction order to petitioner—the defect in which, if any, was purely technical—deprived him of no statutory right or benefit and imposed no detriment of any kind on him.

The Court's inquiry in retroactivity cases has been a pragmatic one primarily oriented to securing the

ends of justice. The ruling in *Fox* was largely prompted by the desire to correct technical defects in the administrative practices of the Selective Service System, preclude the possibility of abuses in the administration of that system by improper use of delinquency regulations, and avoid embroiling the courts in factual disputes as to whether there has been improper use of the delinquency regulations. None of those ends is served by giving the *Fox* decision retroactive effect to the extent that final judgments of conviction based on a factual finding that there has been no improper acceleration of induction should be disturbed. No injustice has been done to petitioner, and he has no valid claim for relief at this time.

ARGUMENT

I

PETITIONER'S CONVICTION WAS PROPER

A. PETITIONER'S INDUCTION ORDER WAS IN COMPLIANCE WITH THE CONSTITUTION, THE STATUTES AND THE REGULATIONS OF THE SELECTIVE SERVICE SYSTEM

Petitioner contends that his induction order was invalid under 32 C.F.R. (1967 ed.) 1631.7(a), which (at the time he was ordered to report for induction) [5] provided that all registrants (with the exception of delinquents and volunteers) had to be found acceptable for service in the Armed Forces and mailed a statement of acceptability at least 21 days before the date fixed for induction. Since petitioner failed to report for his physical examination, he could not have been

[5] This section was amended in 1970. See pp. 6–7, *supra*.

and was not found acceptable prior to the date of his induction order. Instead, he was found a delinquent and ordered to report for induction although he had not yet undergone a physical examination.[4] Petitioner argues that under *Gutknecht* v. *United States*, 396 U.S. 295, he could not have been declared a delinquent and that no other regulations existed under which he could have been ordered for induction without a statement of acceptability.

Petitioner's reliance upon *Gutknecht* is misplaced. In *Gutknecht*, this Court found that the Selective Service System was not authorized to use delinquency status in order to punish registrants who had failed to comply with their Selective Service obligations by accelerating their induction. But in petitioner's case delinquency was not used to punish. It was simply used as a technical device to enable the local board to order petitioner to report for induction even though he had failed to appear for his physical examination. In the context of this case, therefore, the declaration of delinquency operated as an exemption from 32 C.F.R. 1631.7(a) to deal with registrants who had failed to make themselves available for a physical examination offered pursuant to its provisions.

In *Gutknecht*, the defendant, whose classification was 1–A, was declared delinquent by his local board for failing to retain his registration and classification papers in his possession, in violation of applicable Selective Service regulations. The defendant was thereupon ordered to report for induction, about one

[4] Had he reported as ordered, he would have received a physical examination prior to induction. Pet. App. 8a.

month after he was declared delinquent and well in advance of the time when other registrants of his age would have been called. The defendant refused induction and was convicted of that offense.

This Court framed the question posed by the *Gutknecht* case as one concerning "the legitimacy of the delinquency regulations, which were applied to the petitioner, so as to deprive him of his previous standing in the order of call." 396 U.S. at 299.[7] It concluded that the delinquency regulations were invalid as applied to persons in Gutknecht's situation, stating that Selective Service does not have "broad, sweeping power * * * to discipline registrants through the 'delinquency' device" (*id.* at 305). The Court's failure to find "any clues that Congress desired the Act to have *punitive sanctions* apart from the criminal prosecutions specifically authorized" (*id.* at 307; emphasis added) and the danger that the delinquency regulation may be used "to *penalize* or *punish* the free exercise of constitutional rights" (*id.* at 308, emphasis; added) fixed the background against which the case was decided.[8] It was in that context that the Court stated that "[t]he power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines" (*id.* at 306).

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[7] As the Court noted (396 U.S. at 299), the government conceded in its brief that it was "unlikely that petitioner, who was 20 years of age when ordered to report for induction, would have been called at such an early date had he not been declared a delinquent."

[8] In addition, the Court had previously decided in *Oestereich v. Selective Service Board*, 393 U.S. 233, that the delinquency regulations could not be used to deprive a registrant of an exemption to which he was entitled.

The decision in *Gutknecht* does not control this case. Here, the district court expressly found that placing petitioner into a delinquency status in no way accelerated his order to report for induction. Indeed, it found that just the opposite was true—that had petitioner followed the directives of the board, he would have been ordered to report for induction by November 15, 1966, nearly eight months before the date when he finally failed to report (July 11, 1967) (Pet. App. 8a).[9]

Petitioner relies upon *United States* v. *Fox*, 454 F.2d 593 (C.A. 9). In that case, a different panel of the Ninth Circuit ruled an induction order based on delinquency status invalid whether or not induction was in fact accelerated. The panel reasoned that since the defendant had not taken a physical, only his delinquent status enabled the local board to order his induction. *Id.* at 594.[10]

This analysis is faulty and, as the court in *Fox* itself admitted, the result "does not seem * * * a desirable

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[9] Citing *United States* v. *Dobie*, 444 F. 2d 417 (C.A. 4), petitioner asserts that the district court, on remand, employed faulty reasoning and relied upon insufficient evidence in reaching its factual finding that his induction was not accelerated (Br. 47–48). However, that factual question is not properly before this Court, since petitioner did not raise it in his motion under 28 U.S.C. 2255 (R. 1–8). Furthermore, petitioner offers no theory as to why he should be permitted to relitigate on collateral attack this factual finding made after a full hearing and confirmed on direct appeal.

[10] The facts in *Fox* were quite similar to those involved in the instant case. As here, the defendant had been declared delinquent by his local board after failing to appear for a physical. Like petitioner, he was ordered inducted pursuant

case." 454 F.2d at 595. *Gutknecht* does not mean that a declaration of delinquency provides immunity from induction or that the Selective Service System has no power to declare a registrant a delinquent for any purpose. To take an obvious example, the Selective Service System continues to have power to send a notice of delinquency to a registrant prior to referring a case to the Department of Justice for prosecution, in order to ensure that the registrant is aware of his default and in order to give him an opportunity to correct it.

Similarly, the declaration of delinquency here did not serve to punish, but only to abate the requirements of 32 C.F.R. (1967 ed.) 1631.7 prior to the issuance of the induction order. Unlike Gutknecht, petitioner's order for induction was not accelerated because of his delinquency. Moreover, he did not lose his opportunity to have a physical examination prior to induction; the examination, under the applicable procedures, would have been given at the induction

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to 32 C.F.R. (1967 ed.) 1631.7(a) and subsequently failed to report.

Petitioner also cites *Battiste* v. *United States*, 428 F.2d 801 (C.A. 5), as holding that a prior declaration of delinquency automatically renders an induction order invalid under *Gutknecht*. Insofar as the Fifth Circuit accepted that position in *Battiste*, we believe it to be in error. However, the court in *Battiste* appeared to ground its decision not on a *per se* rule that delinquency-based induction orders are always invalid, but on a determination that the declaration of delinquency had accelerated the defendant's induction at least two months and had prejudiced him by precluding consideration of a requested deferment. See 428 F.2d at 802.

station prior to induction. (Finding 8 of the District Court, Pet. App. 8a.)

The decision in *Fox* is not consistent with *Gutknecht*. As the Court made clear in *Gutknecht*: "There is no doubt concerning the propriety of the * * * criminal sanction [for failure to report for induction], for Congress has specifically provided for the punishment of those who disobey selective service statutes and regulations in § 12 of the Military Selective Service Act * * * " (396 U.S. at 299). No distinction should be made between those who do and those who do not report for physical examinations. In truth, as the district court accurately observed on remand in this case (Pet. App. 9a–10a), the only reason petitioner had no pre-induction physical was his own failure to appear for one. It is strange logic indeed to hold that petitioner's own dereliction should immunize him from criminal prosecution for failing to comply with a valid order of his local board. There is no reason to extend *Gutknecht* that far, since the considerations that made the delinquency regulations invalid as applied to Gutknecht are totally absent from their application in this different factual context to petitioner.

B. NOT EVERY TECHNICAL DEFECT IN AN INDUCTION ORDER IS A DEFENSE TO A PROSECUTION FOR REFUSING INDUCTION

In the seminal case of *Estep* v. *United States*, 327 U.S. 114, this Court held that defects in the administrative process leading to an induction order could be raised as a defense upon indictment for refusing induction. The rationale of that decision was clear: "We cannot believe that Congress intended that crim-

inal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction." *Id.* at 121. Thus in *Estep* this Court fashioned a judicial rule that actions of the local board were subject to judicial review—albeit a limited form of review—in the context of a prosecution for refusing induction. "We are loath to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused." *Id.* at 122.

But the rule of *Estep* does not require that every defect in the board's actions, no matter how trivial and no matter how unrelated to significant procedural or substantive rights, be available as a defense. This Court, in the exercise of its review functions, has recognized that even errors of a constitutional magnitude may be harmless and thus may not warrant reversal. See *Harrington* v. *California,* 395 U.S. 250; *Chapman* v. *California,* 386 U.S. 18.

The courts of appeals have long recognized that this same principle applies in the Selective Service context. Thus, in *United States* v. *Lawson,* 337 F. 2d 800 (C.A. 3), the defendant claimed that his order to report for civilian work was, contrary to the regulations, signed by means of a rubber stamp. The court rejected the claim. "Absent some showing of prejudice to appellant due to the failure on the part of the Board to comply with the formal procedural directive of a regulation, an order of the Board, otherwise within its power to issue, will not be invali-

dated." *Id.* at 812. To the same effect see *United States* v. *Sturgis*, 342 F. 2d 328 (C.A. 3), involving failure to comply with an executive order to post the names of advisers conspicuously in the office of the local board. "The failure to so comply by the Board must be coupled with prejudice to the appellant in order to reach that result." *Id.* at 331. The same test has been applied to claimed defects in the order of call, a claim closely analogous to petitioner's. See *United States* v. *Gast*, 457 F. 2d 141, 144 (C.A. 7); *United States* v. *Camara*, 451 F. 2d 1122, 1125 (C.A. 1). In the latter case, the court held that the presence on the call list of persons listed after the defendant but who should have been called before him was not a defense. The court found that the defendant was high enough on the call list to have been called in any event and that therefore he was not prejudiced.

The error claimed in this case did not prejudice petitioner in any way. Hence, even if the delinquency regulations are deemed an administrative creation having no congressional sanction, petitioner suffered no injury as a result of being placed in an unauthorized category. This is not a case in which "Selective Service * * * [exercised] freewheeling authority to ride herd on [a registrant] using immediate induction as a disciplinary or vindictive measure" (396 U.S. at 306). This is instead a case in which petitioner, having persistently failed to perform his duties under the act, was finally ordered for induction later than he would have been had he lived up to his obligations under the act.

II

THE ALLEGED ERROR IN PETITIONER'S CONVICTION IS NOT SUBJECT TO COLLATERAL REVIEW BY MEANS OF A SECTION 2255 MOTION

The Section 2255 motion in this case was properly denied by the courts below because it fails to allege the type of claim that properly gives rise to an occasion for collateral review of a conviction. The ends of justice are not served by allowing a final judgment of conviction to be reopened in a case such as this, in which the issue presented is not one of constitutional dimensions and the original proceedings afforded a full and fair opportunity for the petitioner to advance his claims.[11]

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[11] Pointing to the principle that collateral attack may be barred by failure to raise an issue in the original proceedings (*Sunal* v. *Large*, 332 U.S. 174; see also cases cited at Annotation, 10 A.L.R. Fed. 724, 733 at § 3(a)) and the statement of the court of appeals that petitioner's Section 2255 motion was properly denied because it raised issues that had already been litigated in the earlier proceeding (see cases cited at Annotation, *supra*, 10 A.L.R. Fed. at 775, § 11(a)), petitioner discerns a "Kafkaesque dilemma where he is damned if he does and damned if he does not" (Pet. Br. 30, n. 17). We agree with petitioner that he may be placed in no worse position for having raised the issue than he would have been in had he failed to avail himself of the opportunity to raise it; insofar as the court of appeals' opinion may be read to suggest a contrary conclusion, we think that it is not consonant with this Court's holding in *Sanders* v. *United States*, 373 U.S. 1. The relevant inquiry in this case is not whether the issue was actually dealt with in the prior litigation (so long as petitioner was afforded a full and fair opportunity to present his claims, as he was here), but whether it is the kind of claim as to which Section 2255 confers an opportunity for a second litigation.

The dominant and recurrent theme of petitioner's brief is that since *United States* v. *Fox, supra,* was a change in the law not limited to prospective application, that change in the law should extend to him. We do not wish to engage in a jurisprudential quibble over whether the *Fox* case represents "new" law, erroneous law, or simply the position of a particular panel of the Ninth Circuit on an issue not definitively resolved.[12] Even if *Fox* is "new law," and even if, contrary to our argument in Part III, *infra,* it should be retroactively applied, that is not the end of the inquiry here. For there is a separate and independent issue that must be faced in this proceeding—whether the subject matter of petitioner's motion falls within the scope of the collateral relief available under 28 U.S.C. 2255. If it does not, the district court cannot grant the motion, regardless of whether "new law" was promulgated in *United States* v. *Fox* and regardless of whether the *Fox* decision was in fact correct. Examination of this issue demonstrates that petitioner's motion does not fall within the scope of Section 2255 or of the traditional writ of *habeas corpus.*

In *Fay* v. *Noia,* 372 U.S. 391, 414 this Court referred to *habeas corpus* as a writ available to correct "criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable." The same basic standard applies to proceedings under Section 2255. *Kaufman* v. *United*

[12] Had *Fox* been decided prior to petitioner's appeal from his conviction, it seems clear that a different panel of the Ninth Circuit would not thereby have been bound to reverse petitioner's conviction.

States, 394 U.S. 217, 221–222; see also *Hill* v. *United States*, 368 U.S. 424, 426–428. Dissenting in *Sunal* v. *Large*, 332 U.S. 174, Mr. Justice Frankfurter attempted to classify those cases in which the writ is available. The post-criminal-conviction categories, none applicable here, were (*id.* at 185–186):

1. Conviction by a court lacking jurisdiction of the person or the offense.

2. Conviction under an unconstitutional statute.

3. Violation by the court of specific constitutional rights (Justice Frankfurter listed double jeopardy, self-incrimination, and lack of indictment by a grand jury.)

4. Legality of sentence or conditions of confinement.

Justice Frankfurter noted in this connection that jury panel, trial procedure, and evidentiary matters do not afford grounds for collateral relief except in flagrant cases (which, presumably, would approach or amount to deprivation of the due process right to a fair trial). During the nearly 27 years that have passed since *Sunal*, this Court has not expanded the list, although the types of constitutional claims falling within the third category enumerated above have outstripped the limited enumeration made by Justice Frankfurter.

Indeed, this Court has never assayed with precision the scope of the writ, nor of Section 2255. The most recent text is *Kaufman* v. *United States*, 394 U.S. 217, in which it was said that "'[t]he course of decisions of this Court * * * makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas even though imposed pursuant to the conviction of a federal court

of competent jurisdiction'" (*id.* at 222).[13] The Court was at pains to emphasize the importance of the distinction between constitutional claims and those of lesser dimension for the availability of collateral review (*id.* at 223).[14] Petitioner's claim, as will be discussed more fully below, is manifestly not based on deprivation of constitutional or even statutory rights and is therefore not cognizable in a post-conviction proceeding.

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[13] Although most of the many court of appeals decisions on Section 2255 do not advance a general theory as to its scope, the holdings of the cases are predominately in accord with this test, and the occasional departures from it are unexplained. See, for instance, the cases discussed in footnote 21, *infra*. In *Lothridge* v. *United States*, 441 F.2d 919 (C.A. 6), the court, in following the widely recognized rule that entrapment cannot be raised under Section 2255, observed that "no issue of constitutional dimensions being presented, the issue of entrapment cannot be raised on collateral attack under Section 2255." *Id.* at 922. In *DeMaro* v. *Willingham*, 401 F.2d 105, 106 (C.A. 7), the court said: "[A]s in the case of a writ of habeas corpus, where as here, there is jurisdiction of the crime charged and of the person indicted, the sufficiency of the indictment is not subject to collateral attack and deficiencies of proof or alleged errors of law must assume constitutional proportions before they can be considered." See also, *Genovese* v. *United States*, 378 F.2d 748, 749 (C.A. 2); *Rosecrans* v. *United States*, 378 F.2d 561, 566 (C.A. 5).

[14] We cite this portion of the Court's discussion not because it was specifically addressed to the issue presented by the instant case—the nature of the subject matter cognizable in a Section 2255 motion—but because it reflects the general importance to that issue of the distinction between constitutional claims and other types of claims. The discussion by the Court was a product of the need to distinguish *Kaufman* from the procedurally analogous case of *Sunal* v. *Large*, 332 U.S. 174, with respect to the availability of collateral relief as to an issue not litigated on direct appeal of the conviction.

The policy reasons which underlie the narrow scope traditionally accorded to relief on habeas corpus have been eloquently argued elsewhere and need not be repeated at length here. See, *e.g.*, Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); cf. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965).

Among the policies that underpin the general principle of finality of judgments is the desire to put matters of dispute conclusively to rest. While this consideration has different force in the civil and criminal contexts, it is in basic harmony with the goals of deterrence and rehabilitation embodied in the criminal justice system:

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the law must convey to those in custody that a wrong has been committed, that subsequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.[18]

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[18] *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 262 (Mr. Justice Powell, concurring); *Sanders* v. *United States*, 373 U.S. 1, 25 (dissenting opinion of Mr. Justice Harlan).

Of great practical importance is the fact that collateral review proceedings drain community legal resources, including judges, prosecutors, appointed defense counsel and even courtrooms:

> Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. To the extent the federal courts are required to reexamine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.[16]

Additionally, because collateral attack may be long delayed, it is frequently difficult to determine with reliability the factual issue giving rise to the attack. And, although a successful attack generally entitles the defendant only to a retrial, a long delay can make another trial impossible. Overall, as Mr. Justice Jackson pointed out, selectivity must be the watchword; otherwise, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown* v. *Allen*, 344 U.S. 443, 537.

Petitioner does not deny the traditional limitation of collateral attack to constitutional claims or directly contend that the reach of Section 2255 should now

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[16] *Schneckloth*, *supra*, 412 U.S. 260–261 (Mr. Justice Powell, concurring; footnotes omitted).

be expanded. Rather, he simply states that '[redacted] is too late in the day to assert that *Gutknecht* v. *United States* * * * is not a constitutional holding" (Pet. Br. 31). This assertion is in part a play on words, for in some sense every decision of a federal court is a constitutional holding—rendered by a constitutional court, interpreting and applying statutes and regulations whose ultimate source of legitimation must reside in the fundamental legal charter of our community. But for the purpose of delineating the scope of the writ of *habeas corpus*, the term "constitutional" should not be treated as a synonym for "legal."

Thus, the decision in *Gutknecht* is no more a "constitutional holding" in the sense here relevant[10a] than would be a decision reversing a regulatory agency's denial of a rate increase or the NLRB's determination that certain conduct constituted an unfair labor practice. What is necessary to invoke the court's jurisdiction under Section 2255 is the presentation of a claim that the statute petitioner was convicted of violating was unconstitutional or that the procedures leading to the conviction deprived him of a fundamental constitutional right.

This does not necessarily mean, however, that persons whose induction had been wrongfully accelerated because of delinquency and whose convictions had become final before the *Gutknecht* decision was rendered would not be able to obtain relief under Section 2255.

[10a] We suggest, moreover, that the focus should be on *Fox*, not *Gutknecht*, since the former represents the first holding that an order of the kind petitioner disobeyed was invalid.

Although the Court decided *Gutknecht* on the ground of invalidity of the delinquency regulations as applied under the statute, the Court's opinion makes it clear that it was concerned about the constitutional ramifications of using the threat of military induction as a punitive sanction to enforce the regulations of the Selective Service System. These constitutional issues are both procedural (the lack of full hearing procedures prior to the imposition of the sanction of acceleration) and substantive (the use of the threat of military service as a punishment, particularly in a factual setting implicating First Amendment values)." If a defendant convicted for failing to honor an accelerated induction order based upon delinquency status could make out such a constitutional case in a Section 2255 hearing, he would be entitled to relief.

Petitioner has failed to make out a case that his conviction was contrary to the fundamental law of the Constitution. He has been convicted under the terms of a valid statute making it a criminal offense to refuse to comply with an induction order. The induction order was one that, in the factual circumstances of this case, the Selective Service System was and is empowered by the Congress to issue. Petitioner

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[11] *Gutknecht* involved a registrant who had surrendered his registration certificate and notice of classification as a protest against the Vietnam war. In *United States* v. *O'Brien*, 391 U.S. 367, this Court held that Congress could make similar conduct criminal although it was intended as "symbolic speech." A different constitutional issue is presented as to whether Congress could by statute provide that such conduct would be punished by immediate induction into the armed services.

alleges no inadequacy in the judicial procedures that led to his conviction or in the subsequent extensive review of that conviction. The fact that Selective Service was, after *Gutknecht,* able to order for induction persons in petitioner's position by changing its regulations to provide for an induction order without a physical examination [18] demonstrates that petitioner's claim is not of constitutional or even statutory dimensions, but relates merely to the technical administrative procedures used by the Selective Service System to deal with the situation presented by a registrant who fails to appear for a pre-induction physical.

An argument petitioner might make for the constitutional content of his Section 2255 petition is one he makes only by implication—that he has, unfairly and without good reason, been treated differently from other defendants in the Ninth Circuit whose cases have been controlled by the decision in *United States* v. *Fox.* Petitioner does not present this contention as a full blown equal protection argument—such an argument would create significant difficulty for practices as venerable as this Court's certiorari jurisdiction—but he repeatedly asserts his right to benefit from the Ninth Circuit's "new law".[19]

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[18] This was accomplished by amending 32 C.F.R. 1631.7 to provide that a registrant who fails to report for a physical examination may be ordered to report for induction without a physical examination.

[19] Our observation in our supplemental memorandum in opposition to the first petition for certiorari that "the conflict is an intra-circuit one, and presumably will be resolved by the

Incongruities in treatment of litigants raising similar contentions are presented whenever a rule is held not to be retroactive. As the Court observed in *Jenkins* v. *Delaware*, 395 U.S. 213 at 217-218:

> In short, petitioner's concern for what he refers to as "visible imperfection[s] in a judicial process" merely highlights the problem inherent in prospective decisionmaking, *i.e.*, some defendants benefit from the new rule while others do not, solely because of the fortuities that determine the progress of their cases from initial investigation and arrest to final judgment. The resulting incongruities must be balanced against the impetus the technique provides for the implementation of long overdue reforms, which otherwise could not be practicably effected. Thus, raising the spector of potential anomalies does not further the difficult decision of selecting the precise event that should determine the prospective application of a newly formulated constitutional principle.

Although the "change in law" resulting from the *Fox* decision does not transmute petitioner's claim into one of constitutional dimensions, it is clear that the *Fox* case is at the core of petitioner's argument and that he would not claim entitlement to relitigation of the claims rejected in his original appeal, in the

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Ninth Circuit itself * * *" (Memo. in Opp., p. 2) was an observation of fact and did not suggest that the Ninth Circuit should use this particular case to resolve the conflict, or, indeed, suggest that if the conflict should cease to be of continuing importance, the Ninth Circuit was obligated to resolve it. Indeed, the burden of our argument here is that, after petitioner's conviction became final, his case could not be used to resolve the conflict.

absence of the later case, *even if his claim were valid on the merits and had been erroneously rejected in the earlier proceedings.* We submit, however, that the contention that there has been a change in the law introduces a red herring into the analysis of the issue here presented, which is whether the subject matter of petitioner's claim is cognizable in a Section 2255 proceeding. The answer to that question cannot properly turn on whether the claim is a meritorious one, otherwise there would be no limit on the kinds of claims that would have to be considered (quite independently of any "change in law").[20] This leaves only the possibility that meritorious claims that have subsequently been judicially accepted constitute fit subject matter for such proceedings. Manifestly, however, even this narrow description does not truly relate to or characterize *subject matter.*

Moreover, if the Court were disposed to carve out a new class of Section 2255 proceedings coming within such a "change in law" category, it should do so only with full awareness of the confusion and uncertainty that will arise because of the difficulty in many cases of determining when a "change in law" has occurred. Would there have been a sufficient "change" if *Fox* had been decided by some circuit other than the Ninth? If not, would it suffice to show that the *Fox* result had been reached by two or three (or even all) other circuits? If petitioner's conviction had become final

[20] Conversely, petitioner clearly is not entitled to relief merely by showing a subsequent contrary decision, without regard to the merits of his claim and the correctness of that subsequent decision.

before *Gutknecht* was decided by this Court, would that decision have constituted a sufficient change to open the Section 2255 forum? (The Court will recall in this connection the considerable difficulties encountered in dealing with the retroactivity of *Katz* v. *United States*, 389 U.S. 347, which turned upon the question of when *Olmstead* v. *United States*, 277 U.S. 438, had actually been overruled. See *Desist* v. *United States*, 394 U.S. 244).

In sum, we suggest that the "change" resulting from *Fox* merely demonstrates a greater likelihood that petitioner's arguments at the time of his original conviction had merit and were incorrectly rejected. But unless the Court is going to throw open the doors to collateral attack on the basis of any material meritorious claim, regardless of subject matter, the contention that there has been a "change in law" should not make a claim cognizable which by its nature may otherwise not be raised in a Section 2255 proceeding.

The courts of appeals have generally recognized that Section 2255 does not exist in order to provide a continuing forum to adjudicate the impact, if any, of each new decision on all past convictions. Thus, in *Meyers* v. *United States*, 446 F.2d 37 (C.A. 2), the court, in holding that the allegedly erroneous giving of an "Allen" charge to the jury could not be raised under Section 2255, quoted at length from *United States* v. *Sobell*, 314 F.2d 314, 324–325 (C.A. 2), certiorari denied, 374 U.S. 857:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court, indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" 332 U.S. at 182, 67 S. Ct. at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment.

Nothing in the decisions of this Court suggests a contrary conclusion. Petitioner relies heavily on the statement in *Sanders* v. *United States,* 373 U.S. 1, 17, that "[i]f purely legal questions are involved, the application may be entitled to a new hearing upon showing an intervening change in the law." But that language is not directed to the question of identifying the types of issues that are within the scope of Section 2255, but to the question of the circumstances in which, as to a matter *within the scope* of Section 2255, the

court should rehear a claim. It is in the later context that Judge Wright stated in dissent in *Thornton* v. *United States,* 368 F. 2d 822, 831 (C.A.D.C.), quoted by this Court in *Kaufman* v. *United States,* 394 U.S. 217, 230, that Section 2255 relief should be available "if new law has been made." [21]

Petitioner also relies on the implication of *Sunal* v. *Large,* 332 U.S. 174, and dictum in *Estep* v. *United States,* 327 U.S. 114, 124. In *Sunal,* this Court held that failure to raise an issue on direct appeal barred habeas corpus relief, stating that if the issue had been raised on appeal, as it was by petitioner here, then a different question would be presented as to the availability of collateral relief. The contention in *Estep*

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[21] Similarly, the court of appeals decisions relied on by petitioner for their language do not support his position. All but one involve allegations that constitutional rights were violated in the process of convicting the petitioner. In *Tucker* v. *United States,* 427 F. 2d 615 (C.A.D.C.), the petitioner alleged that incriminating statements had been introduced at his trial which were the product of an illegal arrest, an illegal period of detention, made without counsel after indictment and were involuntary—allegations of violations of the Fourth, Fifth and Sixth Amendments. In *Alford* v. *State of North Carolina,* 405 F. 2d 340 (C.A. 4), petitioner alleged that his guilty plea had been coerced by the statutory threat of a death penalty, a violation of the Fifth and Sixth Amendments. In *Gray* v. *United States,* 407 F. 2d 830 (C.A. 5), the allegation was a denial of the right of confrontation under the Sixth Amendment. *Vanhook* v. *Craven,* 419 F. 2d 1295 (C.A. 9), involved a claim that a stipulation of guilt had been submitted to the trial court without the consent of the petitioner, a violation of the Fifth and Sixth Amendments. Only *Brough* v. *United States,* 454 F. 2d 370 (C.A. 7), holding that the construction of a statute of limitations could be raised under Section 2255, involves a collateral attack on non-constitutional grounds. We submit that *Brough* was wrongly decided.

and *Sunal* was that all members of Jehovah's Witnesses are ministers and therefore were exempt from service under the statute. Section 5(d) of the Act then in effect, 50 U.S.C. App. (1946 ed.) 305(d), provided that "[r]egular or duly ordained ministers of religion" were exempt from training and service. The convicting court in *Sunal* had held that the application of the exemption to petitioners could not be advanced as a defense to a charge of refusing induction.

Although the opinions in *Estep* and *Sunal* are not entirely clear, they appear to be grounded on an assumption that the interests at stake in the context of an induction order are constitutionally so great as to entitle persons subject to an induction order to a judicial hearing on a claim that the statute exempts them from induction. Absent such a judicial hearing, their position would be constitutionally comparable to that of a person sentenced to imprisonment without an opportunity for a judicial hearing on his liability to imprisonment. Had the defendants in *Sunal* pursued their available judicial remedy—an appeal—and still been denied a judicial forum to hear their claim of exemption, then they would arguably have been entitled to a *habeas corpus* hearing so that they might have one judicial forum in which the issue could be tried. Not only does petitioner here advance no such statutory claim, but he has not been denied a judicial forum in which to advance the claim he now makes. To the contrary, he has had such a forum, his claim has been advanced, and it has been denied on the merits.

Because petitioner's motion fails to allege a denial

of fundamental constitutional rights or the denial of a full and fair opportunity to advance his claim at trial or upon direct appeal, it does not state a claim subject to collateral relief under 28 U.S.C. 2255.[22] Therefore, his motion was properly denied by the courts below.

III

EVEN IF THE FOX DECISION IS CORRECT, IT SHOULD NOT BE APPLIED RETROACTIVELY

If the Court concludes, contrary to our argument in Part II, *supra*, that the type of claim presented by petitioner is subject to collateral review, and if it further concludes, contrary to our argument in Part I, *supra*, that the decision in *United States* v. *Fox*, *supra*, is correct, there remains the question whether the *Fox* decision should be applied retroactively, and, if it should, whether such retroactive application should extend back to persons whose convictions have become final.

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[22] We do not contend that the courts are absolutely foreclosed from granting collateral relief in any case, no matter how unjust the result, in which a specific allegation of constitutional error is not advanced. While the Court need not reach the question for purposes of the disposition of this case, there may be instances in which a claim, although based on statute or judicial rule, entails "exceptional circumstances" in which the granting of collateral relief would be within the historic scope of *habeas corpus*. See *Sunal* v. *Large*, *supra*, 332 U.S. at 187 (Frankfurter, J., dissenting). Whatever may be the contours of such an exception to the general principles outlined in the foregoing argument (and it may well be that such cases are in fact no exception, but actually represent instances of due process claims arising out of the manner of application of statute or rule), this is clearly not a case falling within them.

Petitioner seems to suggest that consideration of this issue should turn largely on the retroactivity of *Gutknecht*,[23] "since *Fox* is simply an application of *Gutknecht* to a species of delinquency processing * * *" (Pet. Br. 34–35).[24] We do not find ourselves "hard pressed" (*id.* at 35) to distinguish between the two cases for purposes of retroactivity analysis. On the contrary, the controlling policy considerations that underlie the largely pragmatic retroactivity inquiry suggest to us that the reasons for applying *Gutknecht* (and *Oestereich*) retroactively to registrants who were *punished* for delinquency (which, moreover, took the form of conduct having overtones of expression of political views) by improper acceleration of induction or denial of a

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[23] Of course, the precise question of the application ("retroactive" or otherwise) of *Gutknecht* to petitioner was at the heart of the original litigation in his case.

[24] In many of the cases cited by petitioner as holding *Gutknecht* retroactive, the finding of retroactivity was premised upon the registrant's induction having been accelerated—as petitioner's was not. See *Bradley* v. *Laird*, 449 F. 2d 898 (C.A. 10); *Bruce* v. *United States*, 448 F. 2d 21 (C.A. 4); *United States* v. *Kelly*, 314 F. Supp. 500 (E.D. N.Y.); *Foster* v. *United States*, 320 F. Supp. 646 (D. Conn.); *United States* v. *Rumon*, 315 F. Supp. 1126 (W.D. Pa.). In the rest, the courts did not indicate whether their holdings of retroactivity were based upon acceleration in fact. See *Andre* v. *Resor*, 443 F. 2d 921 (C.A. 9); *Zack* v. *Benson*, 454 F. 2d 596 (C.A. 9); *Swarts* v. *United States*, 3 SSLR 3424 (C.D. Cal.); *Akeson* v. *United States*, 4 SSLR 3430 (D. Colo.); *Kittrell* v. *United States*, 4 SSLR 3439 (N.D. Fla.); *Mikesell* v. *United States*, 3 SSLR 3390 (W.D. Mich.). To the extent that the latter decisions, like *Fox*, applied *Gutknecht* where the delinquency regulations had no punitive effect on the registrants, we believe they were wrongly decided.

statutorily conferred exemption dictate precisely the opposite result in the case of a registrant who has willfully sought to impede the functioning of the Selective Service System and now seeks to rely on a highly technical argument in no way premised on any denial to him of substantial rights. We submit, therefore, that *Fox*, if it is accepted, should be entirely prospective in application—*i.e.*, applied only to cases arising out of induction orders issued after the date of the decision. If it is to be afforded any retroactivity, it should not extend back to final convictions.

Fox does not fit within the rule of *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, relied upon by petitioner (Br. 37). The Court there held that the decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, were retroactive as applied to forfeiture proceedings because those cases "dealt with the kind of conduct that cannot constitutionally be punished in the first instance." 401 U.S. at 723. Distinguishing other retroactivity decisions, the Court continued: "In the case before us, however, even the use of impeccable fact-finding procedures could not legitimate a verdict decreeing forfeiture, for we have held that the conduct being penalized is constitutionally immune from punishment." *Id.* at 724. See also *Robinson* v. *Neil*, 409 U.S. 505, 509.

This case stands on an entirely different footing. No rule of constitutional magnitude was articulated in *Fox*; it simply purported to interpret administrative regulations. Petitioner to the contrary notwithstanding, *Fox* was not a case in which the defendant was

convicted of a charge for which he could not be "constitutionally punished in the first instance." Compare *U.S. Coin & Currency, supra,* 401 U.S. at 723.

There are no retroactivity procedents of this Court directly controlling the instant case. However, in numerous decisions this Court has delineated the several factors which must be considered in determining whether rulings should be applied retroactively or prospectively. In *Stovall* v. *Denno,* 388 U.S. 293, 297, the Court listed the three controlling considerations: (a) the purpose to be served by the new standards; (b) the extent of the reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. See, *e.g., Linkletter* v. *Walker,* 381 U.S. 618, 629, 636; *Tehan* v. *Shott,* 382 U.S. 406, 410–418; *Johnson* v. *New Jersey,* 384 U.S. 719, 726–727; *Michigan* v. *Payne,* 412 U.S. 47, 55; *Gosa* v. *Mayden,* 413 U.S. 665. In addition to applying these criteria to constitutional rulings, this Court has deemed them relevant to decisions grounded on statutory interpretation. See *Fuller* v. *Alaska,* 393 U.S. 80, 81.

Desist v. *United States,* 394 U.S. 244, 249, teaches that the "purpose" criterion is the most important. We submit that the "purpose" of *Fox* does not require its retroactive application. The thrust of that decision was to implement the *Gutknecht* ruling by invalidating all induction orders issued to registrants under the delinquency regulations, regardless of whether the regulations were being employed in a punitive fashion. In so doing, the court assumed that *Gutknecht* had invalidated the delinquency regulations on their face

rather than, as we here contend, invalidating them only in their application to persons in Gutknecht's situation. The court acted as it did not because it thought it unjust to punish Fox for his misconduct, but because it thought its decision necessary to compel regularity of administrative procedures by the Selective Service System and because it desired to avoid embroiling the courts in the factual inquiry as to whether acceleration had actually taken place in each individual case. The first of these objectives is fully served by prospective-only application of the *Fox* decision; the second justifies retroactive application only as far back as trials not yet conducted (the degree of retroactivity afforded *Miranda* by *Johnson* v. *New Jersey, supra*).

The contrast with *Gutknecht* and *Oestereich* is illuminating. The principal "purpose" of those decisions (and *Estep* as well) was to ensure that registrants were afforded the full protection of the statutory scheme of Congress in the administration of the draft laws. No comparable interest is at stake here. Neither petitioner nor Fox was deprived of any statutory right or suffered any detriment as a result of the application of the delinquency regulations.

The *Fox* court may have assumed that a registrant was prejudiced by being placed in a delinquency status because he was thus subject to induction without physical examination. But this is just not so. Had Fox or petitioner reported for induction, they would in fact then have been given physical examinations to determine their inductability. It is thus wholly unfounded to suggest that Fox or petitioner suffered any

injury or unfairness by reason of their delinquency. Indeed, the court realized that *Fox* had suffered no real injustice and that the result it reached did "not seem to be a desirable one" (454 F.2d at 595). It reversed his conviction almost apologetically, noting that "we did not write * * * the regulations, and the defect in them" (454 F.2d at 596).

The decision in *Fox* is thus hardly comparable to a decision placing limitations on the jurisdiction of a military forum (*O'Callahan* v. *Parker*, 395 U.S. 259) or affirming the right to a jury trial in state criminal prosecutions (*Duncan* v. *Louisiana*, 391 U.S. 145, and *Bloom* v. *Illinois*, 391 U.S. 194). Yet in both those instances the Court, adopting a pragmatic approach to the question and focusing upon achievement of the ends of justice, found the rules non-retroactive because the previous procedures had not significantly undermined the truth-determining process.[25] It would be wholly incongruous with this line of cases if a different rule were applied in the circumstances here.

Although the remaining factors—reliance and burden on the administration of justice—have been regarded as having controlling significance "only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity" (*Desist* v. *United States*, 394 U.S. 244, 251), those considerations also support the nonretroactivity of *Fox*.

The Selective Service System, in referring persons for indictment in this situation, has relied upon a rea-

[25] As to the non-retroactivity of *O'Callahan*, see *Gosa* v. *Mayden*, 413 U.S. 665; as to the non-retroactivity of *Duncan* and *Bloom*, see *DeStefano* v. *Woods*, 392 U.S. 631, 633.

sonable belief that induction orders issued to delinquents while 32 C.F.R. (1967 ed.) 1631.7 was in effect were valid under *Gutknecht* if the delinquency declaration had not been used by the local board to punish the registrant. If *Fox* were applied retroactively to void the convictions of defendants like petitioner who also refused to take physicals, the five year statute of limitations (18 U.S.C. 3282) would preclude the reindictment of some (including petitioner) for the alternative offense of failing to appear for a physical. "Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved." *Gosa* v. *Mayden, Supra,* 413 U.S. at 685.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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